STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

AMELIA HOSEY,

Plaintiff/Appellee,

vs.

CHANTAY STARGHILL BERRY,

Defendant/Appellant.

MI Supreme Court:
Case No. 131213

Court of Appeals
Case No. 257709

Lower Court No.
03 050311 NI

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JOSEPH H. HOWITT (P57027)
BERNSTEIN & BERNSTEIN
Attorney for Plaintiff/Appellee
3000 Town Center, Suite 1601
Southfield, MI 48075-1298
(248) 350-3700

RONALD S. LEDERMAN (P38199)
Attorney for Defendant/Appellant
SULLIVAN WARD BONE TYLER & ASHER
1000 Maccabees Center
25800 Northwestern Highway
Southfield, MI 48037-0222
(248) 746-0700

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131213

PLAINTIFF/APPELLEE'S BRIEF IN RESPONSE TO DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBITS

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

Law Offices of
BERNSTEIN & BERNSTEIN
By: Joseph H Howitt (P57027)
Attorneys for Plaintiff/Appellee
3000 Town Center, Suite 1601
Southfield, MI 48075-1298
(248) 350-3700

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STATEMENT OF QUESTION PRESENTED

I. DID THE MICHIGAN COURT OF APPEALS CORRECTLY DETERMINE THAT THE CONTENT OF ATTENDING PHYSICIANS' REPORT RECORDS SUBMITTED BY PLAINITFF/APPELLEE MUST BE CONSIDERED AT A MOTION FOR SUMMARY DISPOSITION?

Plaintiff / Appellee Answers:	Yes
Defendant / Appellant Answers:	No
Court of Appeals Answers:	Yes

PLAINTIFF/APPELLEE'S BRIEF IN RESPONSE TO DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Standard of Review

The issue presented is whether the Michigan Court of Appeals erred in reversing the decision of the trial court. This case is being considered on Defendant / Appellant's Application for Leave to Appeal. This Court has asked for briefs as instructed in an Order dated September 15, 2006.

This case arises out of a motor vehicle collision that occurred on October 7, 2000 and in which Plaintiff-Appellee, Amelia Hosey, sustained injuries to her lower back that required surgical fixation. The lower court was presented with **two** legal issues that Defendant-Appellant felt to be dispositive. **First,** Defendant-Appellant argued that no genuine issues of material fact existed regarding Plaintiff-Appellant's claim that she sustained injuries constituting a "serious impairment of body function." Note that the trial court did not make a decision regarding this particular issue. Defendant-Appellant also argued that there was no evidence in this case to suggest that any of Plaintiff-Appellant's injuries were proximately caused by her motor vehicle collision. For purposes of this Application for Leave to Appeal, the only issue involved is that relating to causation. This issue was decided as a matter of law by the trial court and is therefore reviewed De Novo on Appeal. Cardinal Moody High School v. Michigan Athletics Ass'n, 437 Mich 75, 80; 467 NW2d 21 (1991); Burney v. P.B. Holding Corporation (on remand) 218 Mich App 167-171 (1996), and People v. Krause, 206 Mich App 421, 422; 522 NW2d 667 (1994). "A trial court's grant or denial of summary

disposition under MCR 2.116(C)(10) is reviewed de novo on appeal." Liberty Mutual Ins. Co. v. Michigan Catastrophic Claims Ass'n, 248 Mich App 35, 40; 638 NW2d 155 (2001).

A motion brought under MCR 2.116(C)(10) on the ground that there is no genuine issue as to any material fact must satisfy the court that no factual development is possible which would support the non-moving party's claim. Anderson v. Kemper Insurance Company, 128 Mich App 249 (1983). A Motion for Summary Disposition on the ground of no genuine issue of material fact attacks the factual sufficiency of the claim presented. Second Benton Harbor Corp v. State Paul Title Insurance Company, 126 Mich App 580 (1983). A court reviewing such a motion must give the benefit of reasonable doubt to the nonmovant and determine whether a record might be developed that would leave open an issue upon which reasonable minds may differ. Osman v. Summer Green Lawn Care, Inc., 209 Mich App 703, 706 (1995). "Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10) and the evidence is viewed 'in the light most favorable to the party opposing the motion.'" Universal Underwriters Group v. Allstate Ins. Co., 246 Mich App 713, 720; 635 NW2d 52 (2001). A granting of Summary Judgment under MCR 2.116(C)(10) is only appropriate where a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recover at trial. Abbo v. Beatty Lumber Company, 90 Mich App 500 (1979). Courts liberally find a genuine issue of material fact. *Osman*, supra.

Plaintiff / Appellee's Brief Pursuant to Michigan Supreme Court Order Dated September 15, 2006 – SC: 131213

Statement of Facts / Background

This brief is being submitted pursuant to this Court's Order dated September 15, 2006, a copy of which is attached hereto as **Exhibit 1.** The following procedural history contains the set of facts that Plaintiff / Appellee (hereinafter "Plaintiff") believes to be relevant to Defendant / Appellant's (hereinafter "Defendant") Application for Leave to Appeal.

As this Court is aware, this case arises out of a motor vehicle collision that occurred on October 7, 2000 and in which Plaintiff, Amelia Hosey, sustained injuries to her lower back that required surgical fixation with implantation of hardware. The trial court was initially presented with two (2) issues that Defendant felt were dispositive. Defendant first argued that Plaintiff, as a matter of law, had not suffered a serious impairment of body function. Secondarily, Defendant put forth the argument that Plaintiff's injuries were not proximately caused by the accident.

The original Motion for Summary Disposition before the trial court was heard on or about June 23, 2004. No opinion was rendered with regard to the serious impairment issue. Rather, Plaintiff's case was dismissed because the trial court found, as a matter of law, that Plaintiff's claimed injuries were not proximately caused by her motor vehicle accident.

In response to Defendant's motion, Plaintiff submitted, along with a brief, a large number of medical records including several "Attending Physician's Report" (hereinafter "APR") documents. These APRs are short, one-page documents that a treating

physician usually completes in his or her own handwriting and which include the doctor's signature. These documents are templates (or, as the trial court put it, "pre-printed, standardized forms") that are often sent to treating doctors by insurance carriers in order to obtain important information as to the nature and extent of a claimant's injuries.

In the APR documents, the treating doctor provides a diagnosis as well as information relating to the causal relationship of the injuries to the accident, work disability status, objectivity of the injuries, etc. These documents do allow treating physicians to indicate with an "X" (by checking a box either "yes" or "no") whether a patient's injuries were caused by the motor vehicle accident and whether the injuries are objectively manifested. In such circumstances where the documents are used for insurance purposes, there should really be no question these documents are business records completed and kept in the normal course of business by the physician's office as well as by the insurance carrier.

In this case, similar documents were provided to Plaintiff by her attorneys' office to give to her doctors for completion. These were used to secure payment of PIP benefits (a separate PIP case was handled on Plaintiff's behalf), but also simply to show the injuries were legitimate and causally related to her accident. These documents were completed by three (3) different treating physicians, in their own handwriting. The documents were also signed by all three (3) doctors. These physicians are Dr. Arthur Powell, Dr. Peter Bono, and Dr. V. Mendiratta. A copy of these documents are attached as **Exhibit 2.**

In these documents, Plaintiff's physicians checked the "yes" boxes in response to the question, "Are symptoms and diagnosis a result of the accident?"

The court, reading from a prepared opinion, concluded that the simple checking of boxes by a doctor was insufficient to create a fact question as to whether Plaintiff had any injuries related to her motor vehicle accident of October 2000. No opinion or comment was provided with regard to the admissibility of documents or the Michigan Rules of Evidence. However, the case was dismissed. Incidentally, it should be noted that the trial court came up with the above-mentioned reasoning entirely on its own. Defendant did not assert that the APRs submitted by Plaintiff were, in any manner, insufficient.

Plaintiff then filed a Motion for Reconsideration. Plaintiff submitted an affidavit of Dr. Arthur Powell, Plaintiff's primary care physician. This affidavit not only confirmed all of Dr. Powell's opinions as contained within his APR, but further indicated that the APR was a business record kept in his file in the normal course of business. It was (and continues to be) Plaintiff's position that such records themselves are admissible at trial pursuant to MRE 803(6). However, Plaintiff also argued that MCR 2.116(G)(6) states that, at a motion for summary disposition, the evidence submitted shall be considered to the extent that the **content** or substance **would be admissible.** MCR 2.116(G)(6). Plaintiff took the position that the documents themselves do not have to be admissible. In any event, the trial court denied Plaintiff's Motion for Reconsideration, noting that it involved re-argument of the same issues as before. The trial court's original opinion / transcript as well as the Order denying Plaintiff's Motion for Reconsideration are attached hereto as **Exhibit 3.**

Plaintiff then filed an appeal to the Michigan Court of Appeals. It was at this point that issues relating to the admissibility of the APR documents themselves became a larger issue. Defendant took the position that Plaintiff had proffered inadmissible hearsay documents. Plaintiff's position was that the Michigan Court Rules are clear about what evidence may be considered at Motion for Summary Disposition under MCR 2.116(C)(10). MCR 2.116(G) does not tell us that the documents themselves must be independently admissible for trial purposes. Plaintiff also argued that the affidavit of Dr. Arthur Powell confirmed all of the opinions contained within his APR and that the trial court erred by disregarding this on Plaintiff's Motion for Reconsideration. Oral argument was scheduled and heard by the Michigan Court of Appeals.

The Michigan Court of Appeals reversed the trial court and rendered a written opinion which is attached hereto as **Exhibit 4.**

The Michigan Court of Appeals disregarded the affidavit of Dr. Arthur Powell because it was not notarized under MCR 2.113(A). It was further disregarded because it was submitted only at the time of Plaintiff's Motion for Reconsideration and it was the Court of Appeals' determination, citing Quinto v. Cross & Peters Co, 451 Mich 358; 366-367, that it could not be considered when reviewing the trial court's summary disposition ruling. Regarding the APRs, the Michigan Court of Appeals was of the opinion that these were completed solely for purposes of litigation and therefore this indicated "lack of truth worthiness" for admissibility under MRE 803(6).

However, the Michigan Court of Appeals did agree with Plaintiff that, pursuant to MCR 2.116(G)(6), the ***content*** of the APRs, i.e. the doctors' opinions **would be** admissible. Specifically, the Court of Appeals stated, **"Although the reports**

themselves are inadmissible, the doctors' opinions would be admissible in the form of opinion testimony at trial. To withstand a motion under MCR 2.116(C)(10), '[a]ffidavits, deposition, admissions, and documentary evidence...shall only be considered to the extent that the *content* or substance *would be admissible* as evidence to establish or deny the grounds stated in the motion.' MRE 2.116(G)(6), emphasis added." Please see **Exhibit 4**, the opinion from the Michigan Court of Appeals.

The Court of Appeals concluded, "Therefore, the trial court erred in granting summary disposition on the basis that there was no genuine issue of fact with regard to causation."

With regard to the "serious impairment of body function" threshold, this issue had not been addressed by the trial court and the case was remanded to the trial court for consideration of this issue in light of Kreiner v. Fischer, 471 Mich 109, 131-132. The trial court, incidentally, granted summary disposition in favor of the Defendant as to this issue just recently. Plaintiff has appealed and has a pending case in the Michigan Court of Appeals as to this issue. That appeal is COA# 272336.

For now, however, the Michigan Supreme Court has directed the parties to submit briefs as to the evidentiary issues as directed in the Order of September 15, 2006.

Argument:

MCR 2.116(G)(6) – As Long as the Content or Substance Would Be Admissible, the Evidence Must Be Considered.

A. Generally:

This Court, in its Order, asks that the parties comment on whether MCR 2.116(G)(6) permits a trial court, in deciding a motion for summary disposition, to

consider unsworn statements or opinions of potential witnesses contained in documents that may be inadmissible at trial. It is, first, extremely important to simply look at the plain language of MCR 2.116(G)(5) and MCR 2.116(G)(6).

MCR 2.116(G)(5), in reference to all motions under MCR 2.116(C)(1)-(7) and (10), states that "...affidavits, together with the pleadings, depositions, admissions, and documentary evidence...*must be considered* by the court..." (Emphasis added.)

MCR 2.116(G)(6) states that "Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the **content or substance would be admissible** as evidence to establish or deny the grounds stated in the motion." (Emphasis added.)

Importantly, MCR 2.116(G)(6) does not say that documents (documentary evidence) themselves must be admissible nor is this even implied. Rather, *the content or substance* of those documents is to be considered if it *would be* admissible. The Michigan Court of Appeals did grant oral argument in this case and, as noted earlier, was of the opinion that the documents submitted, by themselves, did not have to be admissible so long as the content or substance contained within those document would be admissible. The Michigan Court of Appeals stated, "Although the reports themselves are inadmissible, the doctors' opinions would be admissible in the form of opinion testimony at trial."

B. If Plaintiff's APRs are Inadmissible, Defendant's IME Reports are Inadmissible:

There is no dispute that the content contained within the APR documents supports Plaintiff's position that her injuries were caused by the subject motor vehicle accident. In fact, three different treating doctors related Plaintiff's injuries to her accident. Defendant argues that the APRs submitted are inadmissible and, therefore, everything about those documents is also inadmissible at a motion for summary disposition. Defendant, however, may at this point recognize that this argument dooms its own position in the case. Defendant's IME reports are also inadmissible and therefore Defendant will have failed to proffer any evidence in support of its motion for summary disposition.

Plenty of documents routinely submitted at the time of motions for summary disposition are not admissible at trial. In the subject case the Defendant relied entirely upon one-time defense medical evaluation reports generated by defense hired doctors to refute causation. (This involved two written reports from Dr. Shlomo Mandel and two similar written reports from a Dr. Philip Friedman.) These documents are unquestionably prepared entirely for litigation and are untrustworthy. Please see this Court's opinion in Solomon v. Schuell, 435 Mich 104, regarding MRE 803(6) and its business record exception. In that case, the Michigan Supreme Court found that four (4) police reports that could potentially be used for purposes of prosecution were inadmissible under MRE 803(6) because the source of information or method or circumstances of preparation were untrustworthy. In one subject case, the Michigan Court of Appeals was of the opinion Plaintiff's APRs (the documents themselves) were inadmissible as they were "prepared for the purpose of litigation." The Court of Appeals

cited People v. Huyser, 221 Mich App 293 (1997), quoting Carlisle v. General Motors Corp, 126 Mich App 127 (1983), in this regard.

It is Plaintiff's position, however, that the APRs are not at all untrustworthy or otherwise inadmissible. It has previously been held that trustworthiness is a condition of admissibility when it comes to the business records hearsay exception of MRE 803(6). *Solomon, supra*, at 122-123. In addition, in *Huyser*, the Michigan Court of Appeals noted, generally, "...that a record 'prepared for the purpose of litigation' lacks the trustworthiness that is the hallmark of a document properly admitted pursuant to MRE 803(6)." Huyser, citing *Solomon*, supra. In *Huyser*, the prosecution had retained a doctor as an expert witness in a case where the defendant was eventually convicted of first-degree criminal sexual conduct. It had been alleged he molested an eight year-old girl. This prosecution's hired doctor authored a written report stating that there was, in fact, vaginal penetration. He was the only witness who would support the prosecution's case in this regard. This doctor died before the trial yet the prosecution, over defense counsel's objection, was permitted to have the doctor's report admitted into evidence under MRE 803(6). The Court of Appeals found the report to be untrustworthy and therefore inadmissible.

Importantly, the Court of Appeals in *Huyser* seemed to note some distinction between reports prepared specifically by a retained physician expert versus a treating doctor. In our case, the APRs were completed by actual treating doctors who are still alive and who will presumably be available to testify at a trial and/or who will give depositions. Again, it was never alleged by Defendant in our case that the APRs were untrustworthy or that their content was not to be believed – at least not until the case

was already dismissed by the trial court. Plaintiff's doctors are actual treating doctors and, in fact, three doctors all believe Ms. Hosey's injuries are related to her car accident. Under these circumstances, the requisite trustworthiness would certainly seem to be present even if the APRs were prepared for litigation.

It is also important to note that in *Huyser* the case was already at trial. This was not a civil case at the point of summary disposition when courts are looking for factual disputes that will likely arise at the time of trial and which allow the case to go forward. Procedurally, there is a difference between summary disposition and trial when it comes to evidence.

In any event, there should still be no question that if Plaintiff's APRs (completed by actual treating doctors) are inadmissible, so are the Defendant's IME reports (completed by hired defense doctors). It is asked that this Court keep in mind that a moving party, when bringing a motion for summary disposition under MCR 2.116(C)(10) *must provide evidence in support of the grounds asserted in the motion.* Specifically, under MCR 2.116(G)(3), "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required...(b) when judgment is sought based on subrule (C)(10)." Unless the **content** of those IME reports **would be** admissible, then Defendant has not provided any evidence to support its position. Defendant would therefore not have proffered any admissible evidence to support its position that the Plaintiff's injuries were not accident-related.

Further, IME documents (or at least a significant portion of what is contained in them) are alternatively inadmissible because they are hearsay documents under MRE 803(4). This allows for a hearsay exception relating to statements made by a patient

for purposes of medical treatment or **diagnosis in connection with treatment** only. These IME doctors are not treating doctors and there is absolutely no doctor-patient relationship between Plaintiff and these doctors.

C. MRE 803(6) Requires the Use of Records Custodians:

Frankly, and from a practical standpoint, at summary disposition the parties are not trying the case. For a typical motion for summary disposition, the parties attach to their briefs all kinds of business records, medical records, etc. The parties are certainly not expected (nor do they desire) to authenticate records that may be used at the time of such a hearing. They do not want to have to take the depositions of or obtain affidavits from records custodians just so they can attach some records to a brief. Judges and attorneys alike would be miserable if this were the case.

If only admissible records and the statements / opinions within them were allowed to be considered at a motion for summary disposition, MRE 803(6) would require that the parties have records custodians testify or provide affidavits simply for purposes of providing information that said records were kept in the course of a regularly conducted business activity and to show that it was the regular practice of that business activity to make the memorandum, report, record, data compilation, etc. From a technical standpoint, virtually nothing would be admissible in terms of documentary business records without going to a lot of otherwise unnecessary trouble and hassle. Arguments over records and their admissibility would become commonplace. Plaintiff would assert that no one will be happy with this. Presumably Defendant will agree with this as well.

D. Affidavits, Depositions, and Most Forms of Admissions are Substantively Inadmissible For Trial; Documentary Evidence Need Not Be Substantively Admissible Either.

There is no dispute that affidavits, deposition testimony, and admissions are specifically allowed for submission at a motion for summary disposition. They are referenced specifically by MCR 2.116(G)(6). It should be agreed that affidavits are substantively inadmissible hearsay documents, yet they are allowed. Deposition testimony (discovery depositions) is also allowed even though this is substantively inadmissible hearsay. Admissions are covered by MRE 801(d)(2) and the form of admission may be submitted to a court in a variety of ways, including through affidavits, deposition testimony, etc. So, when it comes to documentary evidence, why would this have to be substantively admissible at the time of a motion for summary disposition? *All of these forms of evidence are referenced within a single sentence within a single court rule and the same standard applies to all of them.*

But for some blanket rule that all unsworn statements or opinions of any kind within such documents (that may be inadmissible) are inherently unreliable and untrustworthy in every case, in every situation, it appears courts should consider the content and opinions contained within those documents. However, it is believed such a rule would be the functional equivalent of allowing only admissible (for trial) documents and non-hearsay statements within them to be considered at a motion for summary disposition.

Further, from a practical standpoint, there is no question that information within otherwise inadmissible documents, in many situations, would be admissible in another form. In the subject case, the doctors' opinions would be admissible in the form of

opinion testimony. To entirely disregard the documents and their content just because the documents themselves are inadmissible would be the equivalent of dismissing this case based upon a technicality that is easily cured. [As for the portion of this case pending in the Michigan Court of Appeals (regarding the "serious impairment" threshold), Plaintiff's brief contains a signed, notarized affidavit from Dr. Arthur Powell that again confirms the information contained within Dr. Powell's APR.] This is attached hereto as **Exhibit 5.**

In this case, Plaintiff would assert that even Defendant truly believes that Plaintiff's treating doctors, if called to testify, would testify consistently with the opinions contained within their respective APRs. Just because the documents themselves are argued to be inadmissible at trial, their content should still be considered. There is nothing fishy here about the information Plaintiff submitted and its content should be considered pursuant to the Michigan Court Rules. Frankly, Defendant's IME documents should be considered at a motion for summary disposition for the same reasons.

E. The Plain Language of MCR 2.116(G)(6) and a Textual Approach:

It is clear that MCR 2.116(G)(6) states that documentary evidence shall only be considered to the extent that the **content or substance *would be*** admissible as evidence to establish or deny the grounds stated in the motion.

Importantly, the court rules do not state that only admissible documents are to be considered. Had it been intended that only admissible documents be considered, this would have been incredibly simple to write into the court rules. The court rules do not state that documents must be independently admissible or that only content and substance within *admissible* records are to be considered.

The court rule states that so long as the content "**would be admissible**", the evidence is to be considered. This is different than saying "to the extent that the content 'is admissible' or 'is presently admissible' or 'is admissible in the form submitted.'" "Would be" is forward looking. "Would" refers to the future in this instance. It is a term used to express probability or possibility. Plaintiff asserts that this quite clearly means the content is to be considered if, in the future, it would likely be admissible even if in another form.

One would hope that an affiant who provides an affidavit (which is substantively inadmissible at trial) at a motion for summary disposition *would* appear for trial and provide testimony. The probability is that he/she will do so. One would additionally hope that an IME physician who writes a report or a doctor who authors an APR *would* appear at trial to testify live even though the documents themselves may be inadmissible. Consider a police officer who authors a UD-10 crash report that includes a defendant's admission of fault or information collected by the officer himself. That report and its contents are substantively inadmissible at trial. Yet, again, one would hope the officer *would* appear to testify live at trial to substantiate the information within that report.

"Would" is what is referred to, in grammatical terms, as a modal auxiliary. Modal auxiliaries are not verbs, but are used along with verbs to express time or mood. In the case of "would be" as is noted in the court rule, "would" expresses probability. This is a reference to the future and the likelihood of an occurrence.

Therefore, when MCR 2.116(G)(6) states that "[a]ffidavits, depositions, admissions, and documentary evidence…shall only be considered to the extent that the

content or substance *would be admissible* as evidence to establish or deny the grounds stated in the motion", this is clearly forward-looking. The Michigan Court of Appeals, in its decision relating to this issue, italicized the words "would be admissible" in its opinion.

This seems perfectly consistent with the typical standard of review for a motion brought under MCR 2.116(C)(10). A court reviewing a motion under MCR 2.116(C)(10) "...must give the benefit of reasonable doubt to the nonmovant and determine *whether a record might be developed* that would leave open an issue upon which reasonable minds may differ." Osman v. Summer Green Lawn Care, Inc., 209 Mich App 703, 706 (1995), quoting Bedker v. Domino's Pizza, Inc, 195 Mich App 725 (1992). (emphasis added.) This is forward looking. In addition, "Before judgment may be granted, the court must be satisfied that it is impossible for the claim to be supported by evidence at trial." Osman, supra, quoting Tame v. A L Damman Co, 177 Mich App 453 (1989). Again, this is forward looking. It would appear courts in Michigan are looking for evidence that would be admissible later on, at trial.

F. Unsworn Statements or Opinions:

Perhaps it is fair to consider why an affidavit that is not notarized, yet contains statements / opinions, may be stricken from consideration yet an unsworn statement / opinion within an inadmissible record may be considered for its content. Admittedly, this is problematic and somewhat inconsistent. If the trustworthiness of a document is really in question, the trial court should simply ask for more information. Dismissing a case outright based upon a technicality, whether to a plaintiff or a defendant, is not right. At the stage of summary disposition, it is very simple to cure minor procedural deficits.

Presumably, if the APRs submitted to the trial court by Plaintiff had been notarized, they would qualify as affidavits. They were otherwise completed in the doctors' own handwriting and contained their signatures.

Nonetheless, the medical records (indisputably true medical records) that were attached to the briefs at summary disposition refer numerous times to the car accident and to Ms. Hosey's injuries. No doctor specifically said one way or the other than the injuries were caused or not caused by the accident though it was strongly implied that the accident caused Ms. Hosey's injuries, especially since she had absolutely no prior history of back pain. In any event, the Defendant in a (C)(10) motion may not rely upon mere allegations, but must support its motion with something that would be admissible. Defendant has to put forth some evidence that Plaintiff's injuries were not caused by her accident. Defendant's IME reports were all that were submitted. If they are not admissible, then Defendant's motion fails.

If this Court is interested, a complete copy of the various briefs and exhibits submitted by Plaintiff and Defendant at the original motion for summary disposition are attached respectively hereto by reference as **Exhibits 6** and **7**.

Request for Relief:

For the reasons above, it is respectfully requested that this Court deny Defendant's Application for Leave to Appeal. In the alternative, if peremptory action is to be taken such that an Order is sent to the Michigan Court of Appeals directing some further consideration, or if this Court makes some determination, it is respectfully requested that the Defendant's reliance upon IME reports in support of its original motion be referenced in such a document.

Plaintiff's counsel will be happy to try to provide any additional sought information at the time of oral presentation in this matter.

Respectfully submitted,

BERNSTEIN & BERNSTEIN

By:_____

JOSEPH H HOWITT (P57027)
Attorney for Plaintiff/Appellee
3000 Town Center, Suite 1601
Southfield, MI 48075
(248) 350-3700

Dated: October 26, 2006

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause of action by mailing the same to them at their respective business addresses as disclosed by the pleadings of record herein, with postage fully prepaid on October 26, 2006.

_____
Ann VanAartsen